UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

KIPP ACADEMY CHARTER SCHOOL,	:	
Employer,	:	
and	:	
NICOLE MANGIERE and CHRISTOPHER DIAZ,	:	**Case No. 02-RD-191760**
Petitioners,	:	
and	:	
UNITED FEDERATION OF TEACHERS, LOCAL 2, AFT, AFL-CIO,	:	
Union.	:	

EMPLOYER'S REPLY BRIEF ON REVIEW

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Pursuant to the Order Granting Review in Part and Invitation to File Briefs (herein "Order"), issued by the National Labor Relations Board ("the Board" or "NLRB") on February 4, 2019, KIPP Academy Charter School (the "Employer," "KIPP Academy," or "the School") submits this Reply Brief. The Employer urges the Board to continue to consider jurisdiction over charter schools according to the NLRB's well-established principles articulated by the Regional Director in the case at bar.

I. THE UFT AND SEVERAL *AMICI* IGNORED THE SCOPE OF THE BOARD'S ORDER ON REVIEW.

At issue in this matter is a petition filed by employees of KIPP Academy seeking to decertify the United Federation of Teachers, Local 2, AFT, AFL-CIO ("the UFT" or "the Union"). The Regional Director found jurisdiction of the Act, that the School is an "employer" within the meaning of Section (2) of the National Labor Relations Act ("the Act"), that its

employees possess Section 7 rights, and they are entitled to a Board-conducted decertification vote. The Board's Order is unequivocal. It upholds the Regional Director's application of the *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971) ("*Hawkins County*") standard for determining whether an entity is an "employer" within the meaning of Section (2) of the Act or a "political subdivision" and thus exempt from the Act. (Order at 1). It upheld the Regional Director's finding that KIPP Academy is an "employer" subject to the jurisdiction of the NLRA. (*Id.*). The Board's Order specifically denied review of the Union's arguments to the contrary. (Order at 1, fn.1). The Board granted review on the discretional jurisdictional issue – however, although the Union urged the NLRB to solely decline jurisdiction over KIPP Academy and a small number of other New York *conversion* charter schools, the Board expanded the scope to consider "whether the Board should exercise its discretion to decline jurisdiction over charter schools as a class under Section 14(c)(1) of the Act and, therefore, modify or overrule *Hyde Leadership Charter School—Brooklyn*, 364 NLRB No. 88, slip op. at 6 fn. 15, 7-9 (2016), and *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 7, 9-10 (2016)." (Order at 1).

In short, the issue presented by the Board on review is whether the NLRB should abandon its case-by-case analysis in favor of rejecting jurisdiction or, in many cases, withdrawing jurisdiction from every charter school in the United States – not just KIPP Academy, or a few New York schools, but every charter school.

The UFT, unwilling to accept the terms of the Board's Order, continues to argue that the Board should exercise its discretion to decline to assert jurisdiction solely over KIPP Academy, not the entire category of charter schools. (UFT Brief at 18).[1] The *amicus* brief of the American

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[1] "UFT Brief" refers to the brief on review filed herein by the United Federation of

Federation of Labor & Congress of Industrial Organizations urges this same result. (AFL-CIO Brief at 11-12).[2] Similarly, the *amicus* brief of the National Education Association contends the Board should decline jurisdiction over charter schools in New York and unspecified other states – but only in those states which "extend to charter school employees the same robust collective bargaining protections that it provides for traditional public school employees." (NEA Brief at 2).[3]

The UFT and its companion labor organizations refuse to address the issue presented by the Board. It is obvious that any specific position they would assert – whether in favor of, or against a categorical national withdrawal of jurisdiction – would be contrary to the interests of the UFT and other labor organizations. As the Board is well aware, unions have both sought and opposed jurisdiction of the Act, and there are many established charter school bargaining units already organized under the aegis of the Act. The NEA states its position frankly, which in effect is that the Board should assert jurisdiction only where it would advance the interests of its member labor organizations. Whether NLRA jurisdiction favors "management" or "labor" is not only inappropriate as a basis for an exercise of Board discretion, but is utterly irrelevant to the question before the Board.

Several *amici* likewise disregard the terms of the Board's review, arguing for a limited, targeted withdrawal from charter school jurisdiction. Their arguments disregard the distinction between the categorical rejection of jurisdiction over all employees within a particular industry

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Teachers.

2 "AFL-CIO Brief" refers the *amicus curiae* brief on review filed herein by the American Federation of Labor & Congress of Industrial Organizations.

3 "NEA Brief" refers to the *amicus curiae* brief on review filed herein by the National Education Association on behalf of nineteen affiliated state labor organizations.

under Section 14(c)(1) and the declination of jurisdiction in particular instances where "the policies of the Act would not be effectuated by its assertion of jurisdiction in that case." *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 684 (1951), see also *Northwestern University*, 362 NLRB 1350, 1352 (2015) (cited at AFL-CIO Brief at 1-2; UFT Brief at 10; NEA Brief at 3-4; Lusher Brief at 9;[4] Ready Colorado Brief at 7, fn. 31[5]). The UFT's contentions are not germane to the issue presented by the Board here – the blanket withdrawal of jurisdiction from all charter schools. Notably, however, the UFT, the NEA, and the AFL-CIO all concur that a categorical abandonment of charter school jurisdiction is inappropriate.

Similarly, several briefs variously contend the Board should reject jurisdiction over KIPP Academy, or over some charter schools, or over all charter schools premised on the Board's decision in *Temple University – of the Commonwealth System of Higher Education*, 194 NLRB 1160 (1972). In *Temple University*, the Board found the "unique relationship" between the University and the state – at first blush facially akin to the reporting and regulatory relationship of KIPP Academy to New York state – established a basis for denying jurisdiction in this single instance. (UFT Brief at 10-11, AFL-CIO Brief at 2, NEA Brief at 9, Lusher Brief at 9-10). However, the relationship between KIPP Academy and New York State differs significantly and substantively from that found in *Temple University.* There, the Board found "extensive, direct" state control over the school, evidenced by then-recent legislation which asserted control over the University's managing board of trustees, including a mandate that twelve members of the board be "Commonwealth trustees" selected by the governor, the president pro tempore of the state

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4 "Lusher Brief" refers to the *amicus curiae* brief on review filed herein by the Advocates for Arts Based Education Corporation D/B/A Lusher Charter School. It is noted that the Lusher Brief appears to have been submitted twice, on March 6 and 20, 2019.

5 "Ready Colorado Brief" refers to the *amicus curiae* brief on review filed herein by an organization named Ready Colorado.

senate, and the speaker of the state house of representatives; further, that the governor, the mayor of Philadelphia, and the Pennsylvania superintendent of the department of public education additionally be *ex officio* members of the Board. 194 NLRB at 1160-1161. Had this level of state control existed over KIPP Academy, it is beyond question that the NLRB would have been deemed the School a "political subdivision" under the rule of *Hawkins County*, but New York has no such control over KIPP Academy.

II. THERE IS NO EVIDENCE SUPPORTING THE DIRE PREDICTIONS OF HARM TO EDUCATION ARISING FROM NLRA JURISDICTION.

Several *amici* predict grim consequences to the states' ability to provide public education if the NLRB does not withdraw jurisdiction of the Act. There is no evidence in the record of this case, nor any anecdotal evidence proffered here that the large (and growing) body of NLRB charter school caselaw across the country has had any deleterious effect on education.

A. NLRA Jurisdiction Does Not Inhibit Operation of Charter Schools.

Amicus Lusher Charter School rather bombastically states "without charter schools, there simply would be no public education in the City of New Orleans. Consequently, Lusher has witnessed firsthand the impact of the Board's decisions in *Hyde Leadership Charter School – Brooklyn*, 364 NLRB No. 88 (2016) and *Pennsylvania Virtual Charter School*, 364 NLRB No. 87 (2016) and the instability that has ensued." (Lusher Brief at 4). Lusher explains the harm allegedly caused by this "instability":

> ...the Board's effort to assert jurisdiction over charter schools has now plagued unions, charter school operators, local school districts, state departments of education, employers, teachers, and students for years... This confusion is evidenced by the continuous petitions to the Board and the Union's evolving, and often conflicting, stance regarding the Board's jurisdictional authority.

(Lusher Brief at 5). The school argues that the ability to file representation petitions with the

NLRB is somehow damaging to the schools. Further, it is contended that litigation of Board jurisdiction in these cases causes "confusion." Notably, rather than "conflicting" decisions, there has never been a charter school case in Louisiana in which the Board has not found jurisdiction following application of the *Hawkins County* analysis. The fact that parties repeatedly litigate an issue seeking a ruling favorable to them is hardly uncommon in Board jurisprudence, and cannot be conflated with causing an inability to educate students.

Lusher also complains of a contradiction in the arguments posed by the UFT in KIPP Academy (against jurisdiction) and by the position urged by the UFT's parent organization, the American Federation of Teachers, in Louisiana (urging jurisdiction). "The inconsistency of the AFT's position demonstrates that the issue varies by state law and further supports that Board jurisdiction is inappropriate." (Lusher Brief at 5).

Vague arguments regarding "inconsistency" fail to identify any harm created by the provision of Section 7 rights to employees. Moreover, the fact that different states have differing charter school laws underscores the value of the Board's current school-by-school, state law oriented *Hawkins County* analysis. Neither KIPP Academy nor any party is contending that the NLRB should assert jurisdiction over every charter school without that analysis. Further, because labor organizations (or charter school employers) may be on different sides of the same question in different cases is a matter of diverse state law and the parties' own interests. Where it is settled through case decisions that a particular charter school law as applied to a *particular* set of facts will or will not yield NLRA jurisdiction, continued efforts to litigate the same issue is a choice by the parties, not a flaw in the process. Taken to its conclusion, the "instability" argument is a contention that the Act should not apply merely because a party is displeased by jurisdiction. That a party is dissatisfied with a Board decision is not a legally cognizable basis

to argue that the NLRB should change its interpretation of the law. Those self-centric concerns cannot and should not be determinative of whether employees will have the protections of Section 7 rights.

Lusher's "confusion" argument is a straw man. The school offers no examples of how the provision of Section 7 rights to employees would destroy public education in New Orleans. Indeed, nothing in the Act prevents a public charter school from providing service to the community.

B. Section 7 Rights Do Not Prevent the States from Providing Public Education.

It is contended by some *amici* that the Act should be prevented from applying to any charter school because "education" is historically a state, not federal, function. *Amicus* Ready Colorado asserts there has been no Congressional authority for "an NLRB takeover of labor law in charter schools." (Ready Colorado Brief at 4). The International High School of New Orleans similarly argues that Louisiana "has elected to refrain from adopting a mandatory labor-relations scheme for public employees, and it has refrained from creating its own labor board for private-sector employees." (International H.S. Brief at 7-8).[6]

These arguments ignore the plain intent of Congress in passing the National Labor Relations Act: that the NLRA apply to all "employers" as defined by the Act. The Supreme Court endorsed the Board's *Hawkins County* methodology to determine "employer" status – and the Board has just restated its approval of continued utilization of that test. The Regional Director's holding below – consistent with prior Board, regional director, and administrative law judge findings – found that KIPP Academy, like other similarly situated charter schools, are not

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6 "International H.S. Brief" refers to the *amicus curiae* brief on review filed herein by Voices For International Business and Education, Inc. D/B/A International High School of New Orleans.

"political subdivisions" of their respective states, and therefore are "employers" within the meaning of the Act.

These *amici* place talismanic reliance on mere nomenclature. Nothing in the NLRA prevents a state from identifying a charter school as a "public school." Indeed, charter schools are proud to provide public school education. However, while charter schools are public schools in all relevant respects, it is irrefutable that they differ in one way: a state's political subdivisions are not *created* by the initiative and request of private individuals, and they are not *administered* by private individuals. In that way, public charter schools are different from traditional public schools, and although that difference bears no effect on the educational mission of a public charter school, it is the essence of the *Hawkins County* analysis.

This argument further ignores the fact that nothing in the NLRA – and indeed, no facts have ever been alleged to the contrary – interferes with a state's control over or regulation of charter schools, educational standards, or funding. Granting employees (of covered employers) certain uniform rights and providing all parties with a vehicle for resolving grievances and disputes with their employer does not restrict a state's ability to implement and provide oversight of public education. In the case at bar, there is no record evidence that NLRB jurisdiction over New York charter schools disturbs state or local control over education. In short, the Act does no injury to local control over education.[7]

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[7] Although there has never been a jurisdiction determination under Colorado charter school law, Ready Colorado offers a complicated series of hypothetical concerns arguing that at some charters within that state, certain employees are school district employees and others are charter employees, and that the Act could disrupt present bargaining structures. (Ready Colorado Brief at 4-7). While this is purely speculative, it must be noted that the Board is perfectly capable of determining the rights of employees in multiple units even at the same site. The brief also heaps speculation upon speculation, conjecturing that Board jurisdiction will result in an eventual undermining of charter school philosophies through increased government control. (*Id.* at 13-14). While these may be legitimate concerns, they are only appropriate for consideration in a case

Just as the doomsday predictions of "instability" and "confusion" are rhetorical (and notably, the record in this case is bereft of any evidence of their existence), continued assertion of the *Hawkins County* test to determine jurisdiction does not prevent states from determining labor policy for its conventional public employees. Whether particular states have, or do not have, collective bargaining law covering its public employees is not germane to the issue at bar. Jurisdiction over a charter school which has been determined to meet the definition of an "employer" covered by the Act does not deprive the state of the ability to legislate regarding its public sector employees. Where the Board has asserted jurisdiction, it has done so over schools which differ materially from conventional "public" employers. These schools can continue to be identified as "public schools" under state law, however, for the finite purposes of federal labor law, they are covered by the NLRA.

III. CONCLUSION

It is beyond question that the statutory goal of the NLRA was to provide employees of covered employers with the protections of Section 7 and access to the processes of the Board. The Board's long-standing test for distinguishing "employers" covered by the Act from "political subdivisions" exempt from the Act has concluded, after a factual and legal inquiry, that KIPP Academy is a covered employer. The question posed by the Board on review is not whether the NLRB should exercise its individualized discretion to reject jurisdiction over KIPP Academy, but rather whether the Board should withdraw the protection of the Act from employees of all charter schools – to reject application of the *Hawkins County* test, establishing a blanket case law rule barring labor organizations, employees, and employers from even litigating the issue.

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raised regarding jurisdiction at a Colorado charter school – but are not a reason to deny Section 7 rights to employees at KIPP Academy or to all charter school employees nationally.

The Board has no evidentiary basis from which to determine that jurisdiction over any and all charter schools would be contrary to the purposes of the Act, just as it has no basis to assume – without assessment of the evidence in a given case – that it *should* take jurisdiction over *all* charter schools. The record of the KIPP Academy case is bereft of any basis upon which to justify a blanket withdrawal of jurisdiction. The few *amici* briefs received either parrot the same arguments made by the UFT – which were already rejected by the Board – or offer speculative anecdotal concerns arising under the laws of two states. In one of those states (Louisiana), the Board has already considered and extended jurisdiction over certain charter schools. In the other (Colorado), the issue should appropriately be considered by a full record litigating the issue of "employer" status if and when a petition or unfair labor practice charge is filed.

In sum, the labor organization *amicus* briefs agree with KIPP Academy to the extent they oppose a single rule rejecting jurisdiction over all charter schools. National Heritage Academies, operating charter schools in Colorado, Georgia, Indiana, Louisiana, Michigan, New York, North Carolina, Ohio, and Wisconsin, fully concurs with KIPP Academy that the Board should continue its current jurisdictional analysis.[8] The briefs of the Lusher School, International High School, and Ready Colorado argue in favor of a national rejection of jurisdiction, but only offer anecdotal or conjectural arguments arising from the laws of two states.[9]

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[8] See the *amicus curiae* brief of National Heritage Academies, Inc. at page 1.

[9] Notably, no state department of education nor state labor relations agency responded to the Board's invitation to submit briefs. Thus, no relevant agency provided comment, objection, or argument regarding real or potential inhibitions of state educational or labor relations prerogatives caused by jurisdiction of the NLRA over charter schools deemed by the Board to be "employers" within the meaning of the Act. The absence of any statement from the agencies best suited to comment underscores the speculative nature of the contentions urged by those supporting a blanket withdrawal of jurisdiction.

Nonetheless, charter schools as an employer category have continued their rapid growth. According to the National Center for Education Statistics, in 2015, charter schools provided education to 2.8 million students, an increase of 700% since 2000.[10] All accounts are that this trend has continued. The National Alliance for Public Charter Schools reports that charter schools in the 2017-2018 academic year had nearly 3.2 million students and employed hundreds of thousands of teachers and other employees.[11] The very fact that charter schools are expanding at such a rapid pace underscores the need for the Board to continue its practice of assessing schools and state laws rather than arbitrarily dismissing all charter schools and expelling their employees from the protections of the Act.

For the reasons stated above and as stated in the Employer's principal brief, the Board should deny the Request for Review.

Respectfully submitted,

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By: _____
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Dated: April 3, 2019

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10 See https://nces.ed.gov/fastfacts/display.asp?id=30, provided by the National Heritage Academies, Inc. in its *amicus curiae* brief at page 7.

11 See https://www.publiccharters.org/sites/default/files/documents/2018-03/FINAL%20Estimated%20Public%20Charter%20School%20Enrollment%2C%202017-18.pdf